

17. AT&T's customers are harmed by U S WEST's failure with respect to access services. AT&T's customers depend on voice and data telecommunications to conduct their daily business communications.

18. A business that cannot get timely provisioning of new access lines is often prevented from expanding its services, or in the case of a new business, from beginning at all. For example, without adequate telecommunications, the airline industry would be unable to schedule reservations and flights, which would quickly grind air travel to a halt. A similar fate would befall the banking industry, which would be unable to process money transfers, including routine withdrawals by average citizens. Similarly, residential customers are barred from conducting even routine communications when AT&T cannot obtain access facilities.

**The Use of Direct Measures of Quality ("DMOQs") Determines The Quality Of Access Provided By U S WEST**

19. Following divestiture, AT&T developed certain measurements of quality to determine when it was receiving acceptable access services from the Regional Bell Operating Companies ("RBOCs"). These measurements are commonly referred to as Direct Measures of Quality ("DMOQs"). The DMOQs for access service were developed, and have been periodically updated, based on the needs and demands expressed by customers and on advancements in technology.

20. U S WEST's performance quality in meeting the established DMOQs is measured through data reported by U S WEST. U S WEST and AT&T agreed and verified a process by which both companies could use a common set of data to discuss current performance and the issue of sufficiency.

21. AT&T uses the same DMOQs for all of the RBOCs, which permits AT&T to compare and rank U S WEST's quality of access service vis-à-vis the other comparable large monopoly providers. In this manner, AT&T is able to determine whether fluctuations in performance reflect industry-wide problems, changing circumstances within the telecommunications industry, or company-specific problems.

22. To maintain AT&T's traditional high-quality standards, and to satisfy customer quality expectations, it is imperative that the access service provided by U S WEST regularly meet these quality standards.

23. For years, U S WEST has repeatedly stated that (1) it understands that it is required to be 100% in compliance with the DMOQs, and (2) it is committed to meeting AT&T's measures of quality. U S WEST has also promised to take all necessary steps to upgrade technical resources and personnel so as to be able to consistently meet the DMOQs.

24. In 1996, U S WEST represented to AT&T that U S WEST had the "process capacity" to meet the current DMOQs for access services within "99%" accuracy.

**U S WEST Continually Fails To Meet Its Obligations For Providing Access Services.**

25. U S WEST's self-reported DMOQ data demonstrates that the quality of access service provided by U S WEST has been consistently far below the established and agreed upon DMOQs. The data further shows that U S WEST has been unable to maintain any degree of steady improvement, that its performance generally has

decreased, and that its quality fluctuates often enough to suggest that its performance is "out of control."

26. The RBOC to RBOC comparisons also show that U S WEST is last or second to last among all RBOCs for each of the DMOQs regarding access service quality. In contrast, prior to 1993, U S WEST often performed at or near the top in some DMOQs compared to the other RBOCs.

27. This drop from best-in-class to worst-in-class strongly suggests that U S WEST's deteriorating access quality is not the result of industry problems or changed circumstances in the telecommunications industry, but rather, is the result of problems that are specific to U S WEST and arise out of its specific internal practices and procedures.

28. The DMOQs for access services address, inter alia, the time it takes an access supplier to provision new access service. The current DMOQs for access service for the categories addressed in this Complaint are as follows:

(a) Provisioning of new DS1 services: Customer Desired Due Date ("CDDD")

(b) Provisioning of new DS0 services (Digital/VG): CDDD.

29. The following figures are U S WEST's average levels of compliance with its self-reported DMOQs, across U S WEST's 14 state region, for 1995-1999:

	1995	1996	1997	1998	1999 Year to Date
(a) Percentage of U S WEST Timely Provisioning DS1 services:	75.14%	82.17%	80.84%	60.68%	59.31%

(b) Percentage of U S WEST Timely Provisioning DS0 services (Dig./VG):	79.02%	82.59%	88.64%	71.98%	77.83%
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30. Achieving at least 90% compliance with these DMOQs is well within the capacity of current technology as evidenced by the fact that at least three RBOCs currently attain those levels, and the best in class RBOC consistently achieves 98%-100% on-time compliance.

31. Of course, the ability to implement and use such technology to meet these DMOQs requires that U S WEST devote sufficient resources to maintaining and upgrading its network and employing adequate personnel with the necessary training and experience to fulfill customer requests.

32. Interestingly, the Federal Communications Commission has reported that U S WEST may be failing to perform general network upgrades on an on-going basis and, accordingly, its network is less up-to-date than other LECs. In the Matter of Long-Term Number Portability Tariff Filings of U S WEST Communications, Inc., Memorandum Opinion & Order, CC Docket No. 99-35, FCC 99-169 (July 9, 1999) at ¶ 19. The Order further states that U S WEST could have paid for these standard upgrades out of its "existing rate base." Id. at ¶ 39.

33. As another indication that U S WEST may not be applying sufficient resources and personnel to adequately fulfill customer requests, U S WEST reported to the FCC in ARMIS Report 43-05, that it received 361 complaints in Washington from business users in 1998 alone, and 1,776 complaints from residential users in 1998 alone.

34. AT&T's current problems with U S WEST involve both U S WEST's failure to timely provision access facilities and to meet Customer Desired Due Dates

("CDDD") that are promised, and a refusal to commit to provision facilities at all where none are currently available.

35. Both of these problems significantly affect the businesses and consumers of this state, and force AT&T into a position of being unable to offer interexchange service to those customers at all, or to offer service in such an untimely manner that customers suffer their own business, revenue and personal losses in the process. Both are unacceptable and anticompetitive results of U S WEST's conduct.

#### **U S WEST Refuses To Provision Some Services At All**

36. Despite the fact that AT&T provides U S WEST with forecasts on at least a biannual basis regarding the access facilities that it intends to order and utilize during the forecasted period, U S WEST increasingly responds to AT&T's orders by alleging that no facilities are available, and that U S WEST is unable to give a timeframe within which such facilities will become available.

37. Apparently, unless U S WEST has its own independent business reasons for building new facilities to an area, it refuses to build such facilities for AT&T, arguing that no funding is available for such a project. Because AT&T has no alternative source for these facilities, AT&T is entirely unable to serve customers in these areas.

38. Not only is U S WEST refusing to timely provision AT&T's orders in these cases, thereby violating the agreed upon DMOQs between the parties, but is refusing to provide service at all—a situation not even contemplated by the DMOQs between the parties. Although this problem has become increasingly more common in

the past year, U S WEST has been refusing to provision certain access trunks based on a lack of constructed facilities since at least June of 1997.

39. Due to U S WEST's failure to provision access facilities, at least 70 of AT&T's orders for access facilities are currently held in this state.<sup>1</sup> A held order results when U S WEST is "holding" the order and cannot commit to a CDDD, typically due to a lack of available facilities.

40. The following communities in Washington are affected by these held orders: Auburn, Bellingham, Bellevue, Bremerton, Bothell, Kent, Morton, Olympia, Othello, Port-Orchard, Puyallup, Renton, Rochester, Sequim, Silverdale, Sumner, Spokane, Seattle and Tacoma. One of these orders has been outstanding for as long as 210 days. This refusal to provide facilities by U S WEST has caused potentially 1,197,325 lines in this state to be out of service or unable to obtain the service they desire.

41. The extensive duration of certain AT&T held orders is even more curious given that it is U S WEST's policy, at least with respect to non-design services, to contact a carrier within 24 hours of issuing a held order to communicate an anticipated resolution date of no greater than 30 days.

42. In order to alert its potential customers to possible delays in getting service established, AT&T has requested, and U S WEST has refused to provide, a list of all locations affected by the lack of facility condition. Therefore, AT&T only learns about such situations once a customer places an order with AT&T and AT&T orders necessary facilities from U S WEST.

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<sup>1</sup> These held orders do not include any access facilities ordered by AT&T Local Services/TCG.

43. U S WEST's lack of facilities also exacerbates call blocking problems which cause customers' calls to be blocked or to experience an all trunks busy condition during peak hours. Although AT&T requests additional facilities from U S WEST when it becomes aware of call blocking, U S WEST's facilities' shortage make it impossible for those problems to be timely solved, and make the ability to expedite requests for necessary facilities impossible.

44. This inability to obtain expedited service is even more problematic given that it is U S WEST's "policy" not to expedite any orders unless there has been a fire, flood, national emergency, disconnect caused by U S WEST or the customer, or an out of service condition has occurred. The mere blocking of calls does not amount to one of these conditions.

45. The impact of untimely facility additions and resulting call blocking is that many customers beyond simply those that are waiting for dedicated facilities in Washington are affected by U S WEST's refusal to provision adequate access facilities.

#### **U S WEST Fails To Timely Provision The Facilities It Does Install**

46. As shown in paragraph 26 above, U S WEST's on-time provisioning of services across its region has shown no sustainable improvement since 1995. Despite U S WEST's commitments to meet 100% compliance with its DMOQs, U S WEST has consistently failed to meet Customer Desired Due Dates ("CDDD"). In this state alone, U S WEST met its CDDD commitments for DS-1 facilities only 60.53% of the time in May of this year, 60.58% in June, and 53.45% of the time in July of 1999. With these

extremely low percentages of on-time performance, U S WEST remains the poorest performing RBOC for provisioning of access services.

47. Typically, the access service requested by AT&T is not finally completed until AT&T has been forced to escalate the problem through several layers of U S WEST management, often including President and Chief Executive Officer Sol Trujillo.

48. Lack of timely provisioning is extremely detrimental to AT&T's ability to conduct business. During the period that the customer is out of service after having expected service to be turned up, the customer naturally blames AT&T for the problem. Further and more significantly, the customer remains unable to conduct personal or business affairs until the facilities are in place and properly initiated. This can result in thousands of dollars of revenue losses for business customers, and extreme bad will towards AT&T and the Washington telecommunications industry generally.

**U S WEST discriminates in favor of itself, its affiliates, and its preferred communities in its provision of access facilities.**

49. AT&T has continually asked U S WEST to identify "hot spots" in its network, or locations in Washington where its facilities are at or near capacity or incapable of handling additional volumes or services without unreasonable call blocking. This information would enable AT&T to anticipate areas where it is likely to encounter problems in providing new or additional services to its customers. AT&T has also asked U S WEST to identify central offices where U S WEST has elected to make significant expansions to serve its preferred customers. This information would allow AT&T to understand where U S WEST is investing in its network and where its customers' orders may have a strong likelihood of being (or not being) completed on time.

50. U S WEST is providing its affiliates, such as U S WEST !nterprise, with access to this blocking information, information regarding "hot spots" on U S WEST's network and the central offices selected for expansion. By providing its affiliates with such information, its affiliates can build and provide services for targeted customers, knowing its customers will not be affected by U S WEST's poor service. U S WEST's practice of refusing to provide such information to AT&T, while providing such information to its affiliates, unfairly discriminates against AT&T.

51. U S WEST's unilateral decisions regarding when and where it will build facilities also negatively affects the economic viability of those communities where U S WEST chooses not to expand. U S WEST's decisions on where it will build or augment facilities determines which communities will have the necessary telecommunications facilities to grow and which will not. Businesses can not and will not expand if their telecommunications needs cannot be met and if they can not be assured that an adequate telecommunications infrastructure exists.

52. By unilaterally making such decisions, U S WEST not only unfairly discriminates against AT&T by providing it inadequate facilities or service, or refusing to build facilities at all, but it also unfairly discriminates against the community, and the businesses and consumers residing therein, served by the inadequate facilities.

53. In addition, U S WEST's unilateral decisions regarding which communities it will serve essentially allow U S WEST to make business and economic decisions not only for the communities in Washington, but also for AT&T by effectively determining when and where AT&T will be able to serve current and potential end user customers.

54. Finally, U S WEST's inadequate, inefficient and unreasonable facilities and its refusal to build necessary facilities permits U S WEST to unfairly discriminate in a third way: between classes of customers. AT&T uses the access services it purchases from U S WEST to provide services to its customers; U S WEST uses the same facilities to provide services to its retail customers.

55. U S WEST has little incentive to remedy inadequate and inefficient facilities that serve AT&T customers; however, U S WEST has incentive to provide adequate, efficient and reasonable facilities to its retail customers. U S WEST can and does unilaterally decide to replace or augment inadequate and inefficient facilities, or build new facilities, to serve its own retail customers. U S WEST then makes commitments to its customers based on its decisions. AT&T, however, is dependent upon the monopoly services of U S WEST in its territory, and cannot make informed and reasonable commitments to its customers. By unreasonably preferring its own retail customers, therefore, U S WEST unfairly discriminates against its wholesale customers, such as AT&T.

56. One problem with quantifying exactly how discriminatory U S WEST's conduct is, however, arises because U S WEST has refused to provide data to AT&T that compares U S WEST's treatment of itself, its own customers, its affiliates and other Interexchange Carriers ("IXCs") with the delays and unavailability of service suffered by AT&T's customers. While AT&T specifically requested this information from U S WEST on March 18 of this year, U S WEST has consistently refused to provide such data in a disaggregated form that would allow meaningful comparisons to occur, and a determination of discrimination to be made.

**AT&T Has Diligently Attempted To Reach A Resolution Of These Service Quality Problems With U S WEST.**

57. Beginning in 1996, AT&T attempted to work cooperatively with U S WEST to improve U S WEST's access service performance. AT&T's efforts included daily telephone communications as well as a series of face-to-face management and executive meetings. U S WEST's performance deficiencies have been discussed in detail between the parties, and U S WEST has promised again and again to implement plans designed to obtain improved levels of performance.

58. No significant or lasting improvements have been achieved, however, and access service performance has continued to be sporadic and inadequate. Although U S WEST's provisioning of access has remained largely untimely for the last six years, the problem of AT&T's being unable to provide service to its customers at all due to U S WEST's unwillingness to construct additional necessary facilities has risen to extreme levels primarily in the last year.

59. In February of 1997, after discussions intended to resolve U S WEST's access service quality problems remained fruitless, AT&T filed Complaints against U S WEST in Arizona and Minnesota seeking relief for U S WEST's conduct regarding provisioning and maintenance of access services.

60. The parties agreed to informally resolve those disputes, and entered into a Settlement Agreement governing U S WEST's access services across all 14 of its states. The Settlement Agreement provided that U S WEST would meet certain performance objectives each month for a period of 16 months in the areas of both provisioning and maintenance/repair of access facilities, and would compensate AT&T for every month in

which those performance objectives failed to be met. In return, AT&T dismissed without prejudice both pending Complaints against U S WEST.

61. Both parties signed the Settlement Agreement on January 16, 1998, after extensive review of the Agreement by, and consultation with, legal counsel.

62. U S WEST, however, without ever performing under the Settlement Agreement, unilaterally terminated the Agreement on July 28, 1998, arguing that the Agreement was illegal and unenforceable under federal and state law. U S WEST was unwilling to file the appropriate tariffs to support the Agreement.

63. U S WEST's performance with respect to access services has continued to decline despite U S WEST's commitment to improve service in concert with the promised levels of the Agreement.

64. In fact, as this Commission itself recognized in allowing U S WEST only a reduced rate of return during U S WEST's 1995 rate case, U S WEST has a history in this state of service quality problems.

### **CAUSES OF ACTION**

#### **Count I: Failure to furnish necessary facilities**

65. AT&T incorporates the allegations in paragraphs 1 through 64 as if fully set forth herein.

66. RCW 80.36.300(2) declares that it is the policy of the state of Washington to "maintain and advance the efficiency and availability of telecommunications service."

67. RCW 80.36.160 provides that the Commission, in order to insure toll service where it is otherwise unavailable or to "prevent arbitrary or unreasonable practices

which may result in the failure to utilize the toll facilities of all telecommunications companies equitably and effectively," can order a carrier to construct suitable connections for the transfer of conversations.

68. RCW 80.36.260 provides that the Commission shall order improvements or additions to be made if necessary to "secure adequate service or facilities for telecommunications communications."

69. Although WAC 480-120-500 does not attempt to establish a mandatory standard of care, it requires that the facilities of telecommunications companies shall be designed, maintained, constructed and operated to "ensure reasonable continuity of service" and that telecommunications companies must employ prudent practices "including reasonable procedures for forecasting demand for service, to ensure that sufficient facilities and an adequate operating force are available to meet reasonable demands under normal operations."

70. U S WEST's failure to provide to AT&T and its customers adequate access facilities which carry toll services prohibits AT&T's customers from utilizing toll facilities to make calls, and is in violation of RCW 80.36.300(2), RCW 80.36.160, RCW 80.36.260 and WAC 480-120-500.

71. Both AT&T and its customers have been harmed by U S WEST's refusal to construct sufficient and adequate facilities in violation of Washington law.

72. It is necessary that U S WEST be ordered to construct access facilities to fill orders which are held, and those which may be held in the future due to lack of facilities, in order for customers in the state of Washington to receive adequate and effective toll service.

**Count II: Failure to reasonably furnish requested telecommunications services**

73. AT&T incorporates the allegations in paragraphs 1 through 64 as if fully set forth herein.

74. RCW 80.36.090 requires a telecommunications company to "upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communication and furnish telephone service as demanded."

75. RCW 80.36.080 requires a telecommunications company to render and perform requested services in "a prompt, expeditious and efficient manner."

76. WAC 480-120-051 requires a telecommunications company that has received a request for service to "endeavor to provide a specific date upon which service will be provided" and, if service cannot be supplied as agreed, to "promptly notify the applicant" of the delay and reason therefore.

77. U S WEST's failure to provide facilities for access at all, and its failure to timely provision those facilities it does provide, violates RCW 80.36.080, 80.36.090 and WAC 480-120-051.

78. AT&T and its customers have been, and continue to be, harmed by U S WEST's violation of these laws.

79. It is necessary that U S WEST be ordered to timely fill all orders for facilities in order for customers in the State of Washington to receive adequate and effective toll service.

**Count III: Unreasonably Prejudicing and Disadvantaging AT&T, and Preferring  
Itself and Its Affiliates, in the Provision of Non-Competitive Access  
Services**

80. AT&T incorporates the allegations in paragraphs 1 through 64 as if fully set forth herein.

81. RCW 80.36.170 prohibits telecommunications companies from making or giving "any undue or unreasonable preference or advantage to any person, corporation or locality, or subject[ing] any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

82. RCW 80.36.186 further prohibits a telecommunications company from unreasonably preferring itself, or disadvantaging or prejudicing another company, through the access it provides to non-competitive services.

83. WAC 80.36.300 proclaims that it is a policy of the state of Washington not to allow rates for non-competitive telecommunications services to subsidize competitive ventures of regulated companies.

84. The access facilities that AT&T orders from U S WEST on behalf of its customers are non-competitive services.

85. U S WEST's conduct in failing to timely provision, and failure to provision at all in some cases, those facilities necessary to serve AT&T's toll customers is subjecting both AT&T and its customers to unreasonable and unlawful disadvantage and prejudice in violation of both RCW 80.36.170 and RCW 80.36.186.

86. U S WEST's conduct in failing to timely provision, and failure to provision at all in some cases, those facilities necessary to serve AT&T's toll customers, particularly while U S WEST continues to invest in and grow its own and its affiliates'

businesses at a rapid rate in those locations it finds attractive, amounts to unreasonably preferring and advantaging itself and its affiliates in violation of both RCW 80.36.170 and RCW 80.36.186.

87. U S WEST's conduct, in investing in its own and its affiliates' data business, while refusing to construct the facilities necessary to provide plain local and toll service to customers in certain communities, constitutes an unlawful cross-subsidization of business ventures with rates received from non-competitive local exchange and access services in violation of WAC 80.36.300(4).

88. AT&T has been, and continues to be, harmed by U S WEST's violation of these laws.

89. It is necessary that the Commission order U S WEST to regularly report on held orders, orders not timely filled, and areas where facilities shortages exist to determine if U S WEST is unreasonably preferring itself or its affiliates, discriminating against AT&T or other carriers or illegally cross-subsidizing its business ventures.

#### **PRAYERS FOR RELIEF**

90. AT&T requests that the Commission, in an expedited manner:

(1) find, pursuant to RCW 80.36.160 and RCW 80.36.260, that U S WEST's failure to provision necessary access facilities constitutes an unreasonable and unnecessary practice resulting in a failure to equally utilize toll facilities of all carriers, and failure to secure adequate facilities;

(2) find, pursuant to RCW 80.36.090, 80.36.080 and WAC 480-120-051, that U S WEST's failure to timely provision access facilities upon request constitutes a failure

to supply, in a prompt and efficient manner, proper facilities for telephonic communication;

(3) find, pursuant to RCW 80.36.170 and RCW 80.36.186, that U S WEST's practice of failing to timely provision access facilities, and refusal to provision some facilities at all, while at the same time growing and investing in its own and its affiliates' businesses and preferred communities, constitutes giving itself and its affiliates an unreasonable preference and unreasonably disadvantaging AT&T and its customers;

(4) find, pursuant to RCW 80.36.140, that U S WEST's practices as alleged in this Complaint, are inadequate, inefficient, improper and insufficient;

(5) order, pursuant to WAC 80.36.300(4), that U S WEST not subsidize its or its affiliates' competitive business ventures with rates received from non-competitive services, particularly to the detriment of other carriers and other carriers' customers;

(6) under the authority granted it in RCW 80.36.160 and 80.36.260, order U S WEST to immediately fill all of AT&T's outstanding held orders, whether those result from a lack of available facilities or from Customer Desired Due Dates which have not been met on time;

(7) under the authority granted it in RCW 80.36.140 and WAC 480-120-535(3)(b), order U S WEST to report to the Commission and to AT&T at least monthly the number of AT&T orders for access facilities which are held due to a lack of available facilities, and U S WEST's plan for remedying the situation and filling those orders within 30 days;

(8) under the authority granted it in RCW 80.36.140 and WAC 480-120-535(3)(a), order U S WEST to report to the Commission and to AT&T at least monthly

the number of installation appointments met, including the percentage of time that such commitments are not met and the duration of delay from the CDDD to the time the facilities are actually delivered in working condition, and U S WEST's plan for remedying its inability to deliver requested facilities on time;

(9) under the authority granted it in RCW 80.36.140 and WAC 480-120-535(4), order U S WEST to report to the Commission and to AT&T the same information requested in (2) and (3) above for U S WEST itself and for its affiliates, including Enterprise, separately, so that the Commission may ascertain whether U S WEST is continuing to unreasonably prefer or advantage one carrier or affiliate over others, or to discriminate against certain carriers and their customers;

(10) under the authority granted it in RCW 80.36.140 and WAC 480-120-016, order U S WEST to respond to the forecasts provided by AT&T for all access and interoffice facilities within 2 weeks of receiving the forecasts, notifying both the Commission and AT&T of any locations where U S WEST believes such facilities will be unavailable or their availability delayed if ordered by AT&T within the forecasted period, and providing a plan for remedying the situation prior to the time AT&T forecasts placing such orders;

(11) under the authority granted it in RCW 80.36.140 and WAC 480-120-016, order U S WEST to notify both the Commission and AT&T on a monthly basis of any geographic areas in the state where U S WEST anticipates access or interoffice facilities will be unavailable in the coming year and to provide a plan for remedying the situation; and

(12) under the authority granted it in RCW 80.04.380, assess penalties against U S WEST for every current held order, every future held order and all orders which are not timely filled.

RESPECTFULLY submitted this 18<sup>th</sup>, day of August, 1999.

AT&T COMMUNICATIONS OF  
THE PACIFIC NORTHWEST, INC.

By: Mary B. Tribby (RW)

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SERVICE DATE

NOV 12 1999

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re the Complaint of	)	DOCKET NO. UT-991292
AT&T COMMUNICATIONS OF THE ,	)	
NORTHWEST, INC.,	)	THIRD SUPPLEMENTAL ORDER
	)	
Complainant	)	
	)	
	)	
U S WEST COMMUNICATIONS, INC.	)	
	)	
Respondent	)	
	)	ORDER DENYING MOTION
Regarding the Provision of Access	)	TO DISMISS
Services	)	
.....	)	

**BACKGROUND**

This docket is a complaint by AT&T against U S WEST, alleging that USWC has failed to comply with its requirements to provision facilities essential to providing tariffed services to AT&T when needed and that it has discriminated to favor itself. Along with its answer, USWC filed a motion to dismiss. AT&T and Commission Staff answered the motion, and USWC has filed a reply along with a request that it be considered – accepting replies to answers to motions is discretionary with the Commission under WAC 480-09-425. Here, the reply does contribute to understanding the issues, and the Commission accepts and considers it.

**I The Motion to Dismiss.**

When it filed its answer to the complaint, USWC filed a motion to dismiss the complaint. The chief argument in support of dismissal is that most of the complaint relates to services supplied under an interstate tariff. It makes four contentions:

- AT&T failed to state a claim on which relief could be granted;
- A prehearing conference order directed parties to focus presentations on events proving violations within the state;

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- To the extent the complaint purports to be brought for the benefit of its end-use customers, only they have standing to complain; and
- The Commission lacks jurisdiction because the problem relates to services that are provided under an interstate tariff.

**A. Three contentions not argued.**

Three of these contentions are not argued in the motion and can be dismissed with little discussion.

- The threshold for stating a claim on which relief could be granted is low, and pleadings must be read "liberally" (WAC 480-09-425(4)) to effectuate their purpose. This complaint states a claim on which relief might be granted.
- The prehearing conference order directs parties to "focus" on violations within the state but does not exclude other violations, and violations within the state may result from actions taken in other jurisdictions that relate to requirements of the State, in which case the violation would occur here. No basis is shown for dismissing the complaint.
- AT&T has standing to complain as a buyer of USWC services. It is USWC's customer of record and its use of USWC's services to provide service to retail customers does not diminish the mutual responsibilities of the two companies as buyer and seller.

**B. The jurisdictional claim.**

USWC's principal argument appears to be that when a tariff is billed under an interstate tariff, the terms of the tariff apply exclusively to the service provided and any complaint about the service must be addressed exclusively to the FCC and not to the state in which service is provided. USWC contends that the Commission lacks jurisdiction because the vast majority of the purported violations arise as to services provided under the federal tariff. It cites *AT&T v. Central Office Telephone, Inc.*, 118 S.Ct. 1956 (1998) for the proposition that a federal tariff is the exclusive determinant of the services provided under the tariff, even those aspects that are not specifically mentioned in the tariff.

**II The Answers.**

- A. Commission Staff answers briefly, stating that USWC has not shown that AT&T's complaint as involving both interstate and intrastate services; that the actual services supplied under the tariff may be up to 90% intrastate; and that the Commission has an interest in seeing that intrastate services are lawfully provided.

B. AT&T answers at more length. It argues as follows:

- USWC itself acknowledges that AT&T's complaint involves both interstate and intrastate services; the fundamental issue is whether Washington customers are being deprived of service in violation of Washington law; and the record will provide further elaboration of the reasons for Commission jurisdiction.
- The facilities addressed in the complaint are jurisdictional because they carry intrastate traffic.
- It is not settled legally or factually that all facilities used to provide services priced pursuant to federal tariffs are governed exclusively by the FCC. The nature of the traffic as interstate or intrastate should be developed during the hearing.
- The "filed rate doctrine" speaks only to claims at common law, and does not restrict Commission authority. In the *Central Office Telephone* case, the purchaser sought damages for fraud and breach of contract – remedies that the tariff did not provide – and the court merely ruled that the common law claims were preempted by the existence of the tariff. The case did not limit state jurisdiction over intrastate services carried under a federal tariff.
- AT&T's complaint meets the standards set out at RCW 80.04.110 and WAC 480-09-420 and USWC's motion fails to meet the standards set out at WAC 480-09-426.

C. USWC's Reply

U S WEST submits a request for leave to reply along with the reply it would submit if allowed to do so, consistent with WAC 480-09-425(3)(b). The request contends that AT&T's references to legal and public policy arguments in its answer constitute "new matter" entitling it to respond. The Commission accepts the reply.

- USWC cites a 1998 FCC order relating to ADSL providing that the FCC has jurisdiction over mixed-use special-access lines when it is not possible to separate the lines by jurisdiction, and that the lines are subject to FCC jurisdiction unless the interstate traffic is *de minimus* – that is, ten per cent or less of the traffic.
- USWC responds to Staff by presenting an *ad absurdum* argument – that if effect on Washington consumers were the only test of jurisdiction, the Commission would have jurisdiction over everything

that happens within the state. That is not the case, USWC says, and the Commission should exercise its authority only where it does have jurisdiction.

### III Conclusion and Decision.

The jurisdictional issue is one of concern to the Commission. The Commission must not overstep the clear bounds of its jurisdiction. At the same time, it must not slight matters within its responsibilities unless the law is clear that it must do so.

No party has cited a judicial decision, a statute, or a rule that is directly on point. In the absence of clearly controlling precedent, the Commission will accept AT&T's representation that it will expand on jurisdictional facts during the hearing. The Commission has the duty not to usurp federal jurisdiction, it also has a responsibility to Washington consumers to protect their interests when it does have jurisdiction.

We do not believe that the Supreme Court's *Central Office* decision as to the filed-rate doctrine speaks to or controls the decision we make. Among other considerations, the plaintiff there was a private citizen and a customer under the tariff, not another agency of government with regulatory responsibilities that are specifically preserved in federal law.<sup>1</sup> The matters litigated in that proceeding involved financial aspects of the service, and such matters are appropriate for inclusion in tariffs. The filed-rate doctrine addresses common-law remedies. The cited decision simply did not address the question we face.

The Commission in the past has examined a similar "10% rule" and billing by competitive access providers selling unswitched interstate and intrastate services exclusively pursuant to a federal tariff. The Commission found that telecommunications companies offering intrastate service were not exempt from registering with the Commission despite offering services exclusively under federal pricing regulation.

This is consistent with Section 2(b) of the Communications Act of 1934. With certain irrelevant exceptions, that section says that nothing in the Communications Act of 1934 shall be construed to give the FCC jurisdiction over charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service.<sup>2</sup>

The FCC has not in any way clearly provided that it preempts state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of

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<sup>1</sup>Section 2(b) of the Communications Act of 1934, Ch. 552, Title I, Sec. 2(b) 48 Stat 1064, codified as amended at 47 U.S.C. Sec. 152(b) (1994).

<sup>2</sup>The issue of preemption under Section 2(b) is discussed in a slightly different context in Trincheri, Mark P. and Smith, Holly Rachel, "Federal Preemption of State Universal Service Regulations under the Telecommunications Act of 1996," 51 *Federal Communications Law Journal* 303 (1999).

clear authority that a customer's election to take service under a federal tariff per the "ten per cent rule" preempts all state regulatory authority, we decline to so rule. We do expect that the evidence will demonstrate a sufficient volume of intrastate traffic to warrant our proceeding to a decision on the issues presented.

The Commission denies the motion to dismiss. The parties cite no clearly pertinent or binding statute, decision, or rule providing that the FCC has exclusive, preemptive jurisdiction over the subject of the complaint.

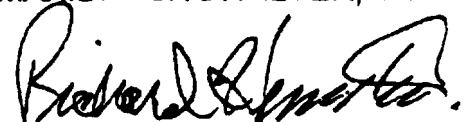
### ORDER

The Commission denies U S WEST's motion to dismiss the complaint.

DATED at Olympia, Washington and effective this 12<sup>th</sup> day of November,  
1999.

### WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION


  
MARILYN SHOWALTER, Chairwoman

  
RICHARD HEMSTAD, Commissioner

  
WILLIAM R. GILLIS, Commissioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15th day of December, 1999, I caused a true copy of the foregoing "Petition for Declaratory Ruling" to be served by hand delivery upon the persons listed on the attached service list.

  
Beatrice M. Williams

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